



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2012-0194; FRL-9723-1]

**Approval and Promulgation of Implementation Plans;
California; Revisions to the California State Implementation Plan Pesticide Element**

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving several revisions to the Pesticide Element of the California state implementation plan (SIP). These revisions include regulations adopted by the California Department of Pesticide Regulation (CDPR) that: reduce volatile organic compound (VOC) emissions from the application of agricultural field fumigants in the South Coast, Southeast Desert, Ventura County, San Joaquin Valley (SJV), and Sacramento Metro ozone nonattainment areas by restricting fumigant application methods; establish a fumigant emission limit and allocation system for Ventura County; require CDPR to prepare and make available to the public an annual pesticide VOC emissions inventory report; and require recordkeeping and reporting of pesticide usage. EPA is also approving CDPR's commitments to manage VOC emissions from the use of agricultural and commercial structural pesticides in the SJV to ensure that they do not exceed 18.1 tons per day and to implement restrictions on VOC emissions in the SJV from non-fumigant pesticides by 2014. We are approving these regulations and commitments as complying with applicable requirements of the Clean Air Act. Lastly, EPA is finalizing its response to remands by the Ninth Circuit Court of Appeals of EPA's previous approvals of the California SIP Pesticide Element.

DATES: The rule is effective **[Insert date 30 days from the date of publication in the Federal Register]**.

ADDRESSES: EPA has established docket number EPA-R09-OAR-2012-0194 for this action.

The index to the docket is available electronically at www.regulations.gov and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some may be publicly available only at the hard copy location (e.g., copyrighted material) and some may not be publicly available at either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with one of the contacts listed in the **FOR FURTHER INFORMATION CONTACT** section below.

FOR FURTHER INFORMATION CONTACT: For information on the approval of CDPR's regulations: Nancy Levin, Rules Office (AIR-4), (415) 972-3848, levin.nancy@epa.gov. For information on the approval of CDPR's commitments and the response to the Ninth Circuit remands: Frances Wicher, Air Planning Office (AIR-2), (415) 972-3957, wicher.frances@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, "we", "us" and "our" refer to EPA.

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I. Summary and Background

This action deals with revisions to California's federally-approved program to reduce volatile organic compound (VOC) emissions from the use of agricultural and structural

pesticides to improve ozone air quality in five areas of the State: the South Coast, Southeast Desert (SED), Ventura County, San Joaquin Valley (SJV), and Sacramento Metro ozone nonattainment areas. VOC from pesticides and other sources react in the atmosphere with nitrogen oxides (NO_x) from mobile and other combustion sources in the presence of sunlight to form ozone.

EPA is approving as revisions to California state implementation plan (SIP) regulations and commitments adopted by the California Department of Pesticide Regulation (CDPR). These CDPR regulations and commitments were submitted by the California Air Resources Board (CARB) to EPA as follows:

1. October 12, 2009 submittal of the following CDPR regulations:
 - Title 3 California Code of Regulations (3 CCR), sections 6447 (first paragraph) and 6447.3-6452 pertaining to field fumigation methods;
 - Portions of 3 CCR sections 6452.1-6452.4 and sections 6624 and 6626 pertaining to emissions inventory;
 - 3 CCR sections 6452.2 and 6452.3 pertaining to field fumigation limits and allowances in the Ventura County ozone nonattainment area.
2. October 12, 2009 submittal of CDPR's revised SIP commitment for the San Joaquin Valley (adopted by the CDPR Director, April 17, 2009). This submittal limits VOC emissions from the use of agricultural and commercial structural pesticides in the SJV to 18.1 tons per day (tpd) and commits CDPR to implement restrictions on non-fumigant pesticides in the SJV by 2014.

3. August 2, 2011 submittal of the following CDPR regulations that revised in part and added to the October 12, 2009 submittal:¹

- 3 CCR sections 6448.1, 6449.1, and 6450.1 pertaining to fumigation method restrictions.
- Portions of 3 CCR sections 6452.2 and 6452.3 pertaining to field fumigation limits and allowances in the Ventura County ozone nonattainment area.
- 3 CCR section 6452.4 pertaining to the annual VOC emissions inventory report.
- 3 CCR section 6626 pertaining to pesticide use reports.

EPA proposed to approve these submittals as revisions to the California SIP on April 24, 2012 at 77 FR 24441. A detailed discussion of these submitted revisions, the Clean Air Act (CAA) and EPA requirements applicable to them, and our evaluation can be found in the proposed rule and the technical support document (TSD) for this final action.² In this final rule, EPA is approving these revisions to the California SIP based on our conclusion that they comply with applicable CAA and regulatory requirements for SIP revisions. We are also finding that the fumigant regulations meet the CAA section 182(b)(2) requirement to provide for reasonably available control technology on the application of fumigants in the SJV.

In the April 24, 2012 proposal, EPA also provided its preliminary response to the remand by the Ninth Circuit Court of Appeals in *Association of Irrigated Residents v. EPA*, 632 F.3d 584 (9th Cir. 2011), revised January 27, 2012 (*AIR*). This remand required EPA to evaluate the

¹ As part of this submittal, CARB also submitted 3 CCR section 6400 (Restricted Materials), 6446 (Methyl Iodide Field – General Requirements) and section 6446.1 (Methyl Iodide Field Fumigation Methods) and methyl-iodide related portions of provisions 6452.2(a)(4)(Annual Volatile Organic Compound Emissions Inventory Report) and 6624(f) (Pesticide Use Records). We are deferring action on these provisions due to California's cancellation, effective March 21, 2012, of the registration of all products containing the active ingredient methyl iodide.

² Air Division, EPA Region 9; Technical Support Document - Final Rule Approval of Revisions to the Pesticide Element of the California State Implementation Plan; August 14, 2012. The TSD can be found in the docket for this rulemaking.

California SIP Pesticide Element for enforceability under the CAA. See 77 FR 24441, 24447. In this action, we are finalizing that response without change.

Lastly, in our April 24, 2012 proposed rule, we referred to another Ninth Circuit petition for review, *El Comité Para El Bienestar De Earlimart v. EPA* (No. 08-74340) ("*El Comité*"). 77 FR 24441 at 24448. In *El Comité*, various environmental and community groups challenged EPA's 1997 approval (62 FR 1150, Jan. 8, 1997) of the 1994 SIP for the 1-hour ozone standard for various California nonattainment areas ("1994 California Ozone SIP"), which included approval of the California SIP Pesticide Element, on the basis of the same 2008 Ninth Circuit decision, *El Comité Para El Bienestar De Earlimart v. Warmerdam*, 539 F.3d 1062 ("*Warmerdam*"), that was the basis for the remand in *Association of Irrigated Residents*. At the time of our April 24, 2012 proposed rule, the Ninth Circuit had not issued its decision in *El Comité*.

Since then, the Ninth Circuit has issued a remand order to EPA in *El Comité* to reconsider its approval of the 1994 California Ozone SIP in light of the *Warmerdam* decision, as required by the remand in *Association of Irrigated Residents*.³ The remands in both *Association of Irrigated Residents* and *El Comité* necessitate the same evaluation (i.e., for CAA enforceability) for the same portion of the California SIP (i.e., the California SIP Pesticide Element). Thus, our decision not to rescind or amend our 2009 re-approval of the California SIP Pesticide Element, in light of today's action approving the CDPR's revised SIP commitment for the San Joaquin Valley and fumigant regulations, finalizes not only our response to the remand in *Association of Irrigated Residents*, but it also finalizes our response to the remand in *El Comité*.

³ The Ninth Circuit issued its remand order in *El Comité* on dated July 2, 2012.

II. Responses to Public Comments on the Proposed Action

A. Comments Received on the Proposed Action

EPA provided the public an opportunity to comment on its proposal to approve the revisions to the California SIP Pesticide Element for 30 days following the proposal's April 24, 2012 publication in the Federal Register. We received one comment letter on the proposed approval. This letter was submitted by the Center on Race, Poverty and the Environment on behalf of itself and 41 California environmental and community organizations (collectively "El Comité"). See letter, Brent Newell, General Counsel, Center on Race, Poverty & the Environment, May 24, 2012. We summarize our response to El Comité's main comments below. Our complete responses to all comments received can be found in section III of the TSD. A copy of the comment letter and its attachments can be found in the docket for this rule.

B. Enforceability of CDPR's Revised SIP Commitment for San Joaquin Valley

Comment: El Comité argues that CDPR's revised SIP commitment to limit pesticide VOC emissions in the SJV to no more than 18.1 tpd is not enforceable because citizens may not enforce the manner in which the Department calculates the baseline inventory and subsequent years' inventories as a means to challenge a failure to adopt regulations or otherwise to limit pesticide VOC emissions in the SJV. They (El Comité) also argue that including the inventory calculation procedures in the SIP would not make the revised commitment enforceable.

Response: Except for the analysis required by CAA section 110(l), the SJV baseline (that is, the 1990 baseline used to calculate the required level of emissions reductions) is no longer at issue now that the State has fixed the maximum level of pesticide VOC emissions allowed in the SJV

at a fixed 18.1 tons per day (tpd).⁴ Once this limitation is incorporated into the SIP, the 1990 baseline inventory will be of only historical interest and neither it nor the calculation procedures used for it need to be enforceable. Therefore, in addressing El Comité's comments, we will focus on the enforceability of the calculation procedures for the subsequent years' inventories.

The "emissions inventories" required by both the revised SIP commitment for the SJV and the fumigant regulations should not be confused with the emissions inventories that are required by specific sections of the CAA, such as sections 172(c)(3) and 182(a)(1). They are not the same in either scope or purpose. CAA section 172(c)(3) requires SIPs to "include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such [nonattainment] area...." The purpose of the comprehensive inventories required by this and similar CAA sections is to provide the basis for, among other things, the demonstrations of attainment and progress toward attainment required, for example, by CAA sections 182(c)(2)(A), 182(b)(1), and 182(c)(2)(B). Emissions inventories submitted to meet the CAA's specific inventory requirements are intended to describe but not control emissions from sources and source categories in the inventory and thus are not enforceable emission limitations as defined by CAA section 302(k).

In contrast, the "emissions inventory" called for in the revised SIP commitment and fumigant regulations is not a specific requirement of the CAA. It is instead an emissions estimation for a single emissions source—pesticide usage in the SJV—for the sole purpose of "evaluat[ing] compliance with the 1994 SIP pesticide element for SJV." Revised SIP commitment for the SJV, p. 2. Together with the calculation methodology in the Neal

⁴ Fixed, that is, without the State first seeking and EPA approving through notice and comment rulemaking a revision to the SIP. To be approved, such a SIP revision would need to meet all applicable CAA requirements and not be barred under the section 110(l) non-interference provisions.

memorandum,⁵ the annual inventory requirement in 3 CCR section 6452.4(a)(1), and the reporting and recordkeeping requirements in sections 6624 and 6626, it is the means for monitoring compliance of this emissions source (pesticide usage in the SJV) with its applicable emission limit of not more than 18.1 tons of VOC per day.

Under the CAA and EPA regulations, a wide range of data and means of collecting data qualify as methods to monitor compliance. CDPR's procedures for monitoring compliance with the 18.1 tpd emission limit for VOC emissions from pesticides in the SJV fall squarely within this range. See, for example, 40 CFR 64.1 (defining compliance monitoring to include emission estimation and calculation procedures).

EPA considers the compliance monitoring associated with an emission limitation to be part of that limitation and, once incorporated into the SIP, enforceable under CAA sections 113 and 304. Therefore, including the inventory calculation procedures along with the requirements for an annual emissions inventory report and recordkeeping and reporting by pesticide users (which collectively constitute the compliance monitoring procedures for the 18.1 tpd emission limit), in the SIP will make CDPR's revised commitment for the SJV fully enforceable under CAA sections 113 and 304.

We also note that citizens seeking to enforce the revised commitment for the SJV under CAA section 304 are not restricted to using CDPR's inventory procedures or CDPR-generated inventories to demonstrate a violation. Under the CAA and EPA regulations, citizens may use any credible evidence of violation to enforce a SIP-approved emission limitation under CAA section 304. See CAA section 113, 40 CFR 51.212(c) and 40 CFR 52.12 and 52.30.

⁵ The Neal memorandum is the memorandum from Rosemary Neal, Ph.D., CDPR to Randy Segawa, CDPR, November 5, 2008; Subject: Update to the Pesticide Volatile Organic Inventory. Estimated Emissions 1990-2006, and Preliminary Estimates for 2007. This memorandum is being included in the SIP in this action.

Comment: El Comité comments that EPA proposes to find that the revised SIP commitment for the SJV is enforceable based on the Neal memorandum, citing to the proposed rule at 77 FR 24441, 24444. It then claims that EPA contradicts itself by stating the SIP revision is unenforceable because it does not commit to specific measures to ensure that the 18.1 tpd limit is not exceeded, citing to the proposed rule at 77 FR 24441, 24450.

Response: We did not propose to find that the revised commitment for the SJV is enforceable based solely on the Neal memorandum. In the proposed rule, we cite not only to the Neal memorandum but also to several other provisions in CDPR's submitted regulations⁶ and to the fumigant application method regulations to find that the 18.1 tpd emission limit for the SJV is enforceable:

These [compliance monitoring] provisions are clear and adequate in combination with the fumigant regulations to ensure the pesticide VOC limit for the SJV is enforceable as required by CAA section 110(a)(2)(A).

77 FR 24441, 24444.

This statement is consistent with the one later in the proposed rule that El Comité claims contradicts it:

Considered in isolation, the revised commitment for San Joaquin Valley changes the form of the commitment in the 1994 Pesticide Element for the SJV but does not represent an enforceable measure for SIP purposes. However, when viewed in light of the CDPR's regulations, the combination of the commitment and fumigant regulations does meet the minimum requirements for enforceability of

⁶ These other provisions included the annual emissions inventory requirements in section 6452.4; the emissions inventory calculation methodology in section 6452.4(a)(1) and recordkeeping and reporting requirements for pesticide users in sections 6624 and 6626. We are approving each of these provisions into the California SIP.

SIP measures and reasonably ensures that the 12 percent emissions reduction target from the 1994 Pesticide Element would be achieved in San Joaquin Valley.

77 FR 24441, 24450.

Comment: El Comité argues that EPA’s proposal to approve the revised SIP commitment for SJV as enforceable conflicts with the Ninth Circuit’s decision in *Warmerdam*. They assert that in this decision, the Ninth Circuit did not allow citizens to “bootstrap” arguments of inventory manipulation to enforce a commitment to adopt regulations, citing *Warmerdam* at 1072-73. El Comité argues that the revised SIP commitment is a discretionary commitment and that the CAA does not allow such discretionary commitments.

Response: Our finding that the revised commitment for SJV is enforceable does not conflict with *Warmerdam*. In *Warmerdam*, the Ninth Circuit ruled that the baseline inventory could not be turned into an enforceable emission limitation by “bootstrapping it to the commitment to adopt regulations.”

As explained above, except for the analysis required by CAA section 110(l), the SJV baseline (that is, the 1990 baseline used to calculate the required level of emissions reductions) no longer has a purpose now that the State has set the maximum level of pesticide VOC emissions allowed in the SJV at a fixed 18.1 tpd. Once that limitation is incorporated into the SIP, the 1990 baseline inventory will be of historical interest only and neither it nor the calculation procedures used for it need to be enforceable in the future. We note that this will also be true for the 1990 baseline inventory for Ventura County once we approve the fumigant regulations.

CDPR’s revised SIP commitment for the SJV is not a discretionary commitment. As discussed above and in the proposed rule, the commitment (including the fixed 18.1 tpd

limitation on pesticide VOC emissions in the SJV), the monitoring procedures necessary to determine compliance with it, and the fumigant regulations combine to be a fully enforceable program under the CAA once approved into the SIP. We note again that citizens may use any credible evidence to enforce the commitment and are not restricted to using inventories generated by the State.

Comment: El Comité argues that the revised commitment by CDPR to manage pesticides emissions in the SJV is unenforceable because it is impractical to determine whether emissions levels are exceeded because inventories are only available two years after the fact. They further argue that the emission controls should constantly limit pesticide VOC emissions and “not lag two years behind.” To support these arguments, El Comité cites to the discussion of the fundamental principles for SIPs and control strategies found in the General Preamble at 13567-13568,⁷ noting in particular the second principle relating to enforceable measures. They also cite to the General Preamble’s discussion of enforceability of SIP regulations at 13502.

Response: El Comité confuses two requirements: the requirement that an emission limitation assures continuous emissions reductions and the requirement for a practical means of determining compliance with that emission limitation. The cited sections of the General Preamble all address the latter requirement. We have reviewed CDPR’s revised SIP commitment for the SJV against the criteria for enforceability given in the General Preamble and determined that it meets them. See TSD, section III.B., Response B-6.

⁷ The “General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,” published at 57 FR 13498 on April 16, 1992, describes EPA’s preliminary view on how we would interpret various SIP planning provisions in title I of the CAA as amended in 1990, including those planning provisions applicable to the 1-hour ozone national ambient air quality standard (NAAQS). EPA continues to rely on certain guidance in the General Preamble to implement the 8-hour ozone NAAQS under title I.

As to the requirement for continuous emissions reductions, we cannot consider the 18.1 tpd emission limit for the SJV as unrelated to the fumigant regulations. Not only do the fumigant regulations contain the reporting and recordkeeping requirements necessary for monitoring compliance with the limit, they also contain the principal control requirements for maintaining pesticide VOC emissions in the SJV under that limit. CDPR considers the 1.5 tpd in emissions reductions from the application method restrictions in the fumigant regulations to be sufficient to meet the SJV limit in a typical year.⁸ These restrictions apply throughout the May 1 to October 30 regulatory season and thus provide for continuous emissions reductions during that season.

As a practical matter, CDPR produces the inventories as soon as practicable given the size and complexity of the source at hand (pesticide usage in the SJV), the sheer amount of data that must be evaluated, and the requirement in 3 CCR section 6452.4(b) that the public be given 45 days to comment on the draft inventories.

C. Approval of the Revised Pesticide Element for SJV under CAA Section 110(l)

Comment: El Comité comments that the commitment in the existing 1994 Pesticide Element is both a tonnage commitment in an areas' attainment year and a percentage commitment: 13 tpd reduction by 1999 and 20 percent reduction from 1990 by 2005 in the SJV.

⁸ CDPR, "Staff Report on the Department of Pesticide Regulation's Proposed SIP Commitment for San Joaquin Valley," ("CDPR staff report"), p. 4.

Response: We agree that the commitment in the 1994 Pesticide Element⁹ is both a tonnage commitment and a percentage commitment, and we agree that the ton per day reduction called for in the Element is 13 tpd. Where EPA disagrees with El Comité is that EPA has concluded that the percentage commitment corresponds to the tonnage commitment in that they both relate directly to the attainment needs of SJV in achieving the 1-hour ozone standard by 1999 as anticipated by California in 1994 and 1996 in developing its Ozone SIP, and approved by EPA in 1997 when EPA approved that plan.

We explained the basis for our conclusion in this regard on pages 24446-24447 of the proposed rule. First, we note that the Boyd Letter, while clarifying certain other aspects of the Pesticide Element, introduced an ambiguity in the percentage commitment for SJV by stating, in the same paragraph, that the commitment in each SIP area (which in this context presumably includes SJV) is for a 20 percent reduction from 1990 to 2005 and that the credit taken in SJV is 12 percent.

To resolve this ambiguity, EPA is taking into account the words of the 1994 Pesticide Element itself and the words of EPA's final rule approving the 1994 California Ozone SIP, including this Element.

First, the 1994 Pesticide SIP committed CDPR to a “maximum of 20 percent” reduction in pesticide VOC emissions from 1990 baseline levels in areas “which reference VOC

⁹ As these terms are used in this document, the “1994 Pesticide SIP” is the *State Implementation Plan for Agricultural and Commercial Structural Pesticides*, November 15, 1994 which was submitted as part of the *1994 California State Implementation Plan for Ozone* (“1994 California Ozone SIP”). The 1994 Pesticide SIP is incorporated at 40 CFR 52.220(c)(204)(i)(A)(6). The 1994 California Ozone SIP was approved at 62 FR 1150 (January 8, 1997). The “Boyd Letter” is the letter from James Boyd, CARB’s Executive Officer to David Howekamp, Air and Toxics Division Director, EPA Region 9, June 13, 1996. This letter and its appendices are incorporated at 40 CFR 52.220(c) (236). The 1994 Pesticide SIP and the Boyd Letter collectively constitute the “1994 Pesticide Element.”

reductions” from the element in their plans. See 1994 Pesticide SIP, p.1. In the case of SJV, the “plan” that references VOC reductions from the Pesticide Element is the attainment demonstration plan for SJV in the 1994 California Ozone SIP, and it took credit for a 12 percent (not a 20 percent) reduction in baseline emissions from 1990.

Second, the Pesticide SIP states: “[t]he plan offers the flexibility to achieve reductions of less than 20 percent by the year 2005 in air districts if less pesticide VOC emission reductions are needed.” *Id.* At the time when the 1994 California Ozone SIP was adopted and approved, the applicable attainment date for SJV was 1999, and the 1994 California Ozone SIP, as ultimately approved, took credit for only a 12 percent reduction in pesticide VOC emission in that area because that was all that the attainment demonstration at the time called for from that source category. By its terms, the 1994 Pesticide SIP was developed specifically to be flexible enough to provide for a less-than-20 percent reduction in areas that did not need the full 20 percent to meet attainment needs.

Third, in EPA's final rule approving the 1994 California Ozone SIP (and the related 1994 Pesticide Element), we summarized our understanding of the emissions reduction commitments in the Pesticide Element as follows: “As described in the SIP, California has committed to adopt and submit to U.S. EPA by June 15, 1997, any regulations necessary to reduce VOC emissions from agricultural and commercial structural pesticides by 20 percent of the 1990 base year emissions in the attainment years for Sacramento, Ventura, Southeast Desert, and the South Coast, and by 12 percent in 1999 for the San Joaquin Valley.” See 62 FR at 1150, at 1170 (January 8, 1997). Therefore, in view of the overall design and purpose of the 1994 Pesticide Element and EPA's understanding of the commitments in the Element at the time of the approval of the Element into the California SIP, we have concluded that the approved Pesticide Element

includes a 12 percent emissions reduction commitment in SJV, not a 20 percent emissions reduction commitment.

Comment: El Comité comments that the plain language of the 1994 Pesticide SIP and the [Boyd] Letter together commit to achieve a 20 percent reduction of pesticide VOC from 1990 levels by 2005, and EPA's approval of the revised SIP commitment for SJV will violate section 110(l) because CDPR and CARB have failed to demonstrate the change in the commitment to 12 percent will not interfere with attainment, reasonable further progress (RFP), or any other requirements of the CAA. They also comment that EPA's finding that the existing commitment is for 12 percent (rather than 20 percent) and that, as a result, approval of the revised SIP commitment for SJV would not violate section 110(l), has no basis in the plain language of the SIP, and is contrary to the Ninth Circuit's decision in *Safe Air for Everyone v. EPA*, 488 F.3d 1088 (9th Cir. 2007).

Response: As discussed above, EPA believes that the SIP commitment in the 1994 Pesticide SIP (as modified by the Boyd Letter) for SJV is ambiguous and thus subject to interpretation. We have interpreted the 1994 Pesticide SIP and Boyd Letter, in light of the language of both and do not find any one sentence of either document to be a definitive statement as to the commitment in SJV. Rather, in light of CDPR's stated purposes and design of the 1994 Pesticide Element itself, and the reliance on it by California in demonstrating attainment of the SJV by 1999 with respect to the 1-hour ozone standard, we have concluded that, consistent with EPA's language in approving the 1994 Pesticide Element, that the commitment is a 12 percent commitment in SJV. Thus, we do not view our approval of the revised SIP commitment for SJV as a relaxation in the California SIP because it would result in the same emissions reductions as would result under the existing approved California SIP Pesticide Element.

Our conclusion in this regard is not contrary to the Ninth Circuit's decision in the *Safe Air* case cited by El Comité. As noted by El Comité, in *Safe Air*, the Ninth Circuit held that the content of a SIP is based on its “plain meaning when such a meaning is apparent, not absurd, and not contradicted by the manifest intent of EPA, as expressed in the promulgating documents available to the public.” *Safe Air for Everyone v. EPA*, 488 F.3d 1088, at 1100 (9th Cir. 2007). In this instance, the meaning of the 1994 Pesticide Element’s percent reduction SIP commitment for SJV is not “plain,” and even if it were, it is “contradicted by the manifest intent of EPA, as expressed in the promulgating document available to the public,” i.e., EPA's 1997 final rule approving the 1994 Pesticide Element into the California SIP. Thus, EPA's interpretation of the Element’s percent reduction SIP commitment for SJV in the context of this rulemaking is consistent with the Ninth Circuit's decision in *Safe Air* and consistent with EPA's stated interpretation in 1997 of this same commitment.

As to CAA section 110(l), relative to California's and EPA's interpretation of the Pesticide Element to require a 12 percent reduction in pesticide VOC emissions in (rather than 20 percent) from a 1990 baseline, we have concluded that the revised SIP commitment for SJV would result in, at a minimum, the same emissions reductions that are currently required under the approved SIP, and neither the approved 8-hour ozone plan nor the approved PM_{2.5} plan for SJV rely on emissions reductions due to the Pesticide Element. As such, we have also concluded, as we did for the proposed rule, that our approvals of the fumigant regulations and revised SIP commitment for SJV will not interfere with attainment and RFP or any other applicable requirement of the CAA and thus comply with the requirements of CAA section 110(l). See 77 FR 24441, at 24447.

Comment: El Comité comments that an approval of the revised SIP revision would violate CAA section 110(l) because neither CDPR nor CARB has demonstrated that the SIP revision does not backslide when it changes the manner by which the 1990 baseline inventory is calculated. They contend that the 1994 Pesticide Element committed CDPR to using the 1991 Pesticide Use Report (PUR) data to estimate the 1990 baseline inventory because “such data is more accurate than 1990 PUR data.”

Response: CAA section 110(l) does not prohibit any backsliding and does not bar approval of a SIP revision based solely on a state’s failure to accompany the revision with a demonstration of non-interference. Section 110(l) only prohibits backsliding that would interfere with any applicable requirement of the CAA.

As stated above, we have concluded that the emissions reduction commitment in SJV under the existing SIP is 12 percent from 1990 levels, not 20 percent, and thus, the establishment of a 18.1 tpd limit (which represents a 12 percent reduction from 1990) through this SIP revision would result in the same emissions reductions from pesticide VOC emissions as required under the existing SIP.

We reviewed the language of the existing Pesticide SIP itself to see whether it could be reasonably interpreted to allow for use of 1990 PUR data, rather than 1991 PUR data, to determine whether the establishment of the 18.1 tpd limit (determined using 1990 PUR data) represents a revision to the SIP that would result in an emissions impact. If the existing SIP could be reasonably interpreted to allow for use of 1990 PUR data, then no emission impact would result.

The 1994 Pesticide SIP requires that a 1990 baseline inventory be used to determine the level of emissions reductions needed: “[t]his plan is designed to reduce volatile organic

compound (VOC) emissions from agricultural and commercial structural pesticide applications by a maximum of 20 percent from the 1990 baseline” p. 1. The 1994 Pesticide SIP is clear that this 1990 baseline inventory is to represent conditions in 1990:

- “The base year inventory will be created from the 1991 Pesticide Use Report and then adjusted by a factor to represent the 1990 base year.” p. 5;
- “In cooperation with DPR, [CARB] will develop a baseline inventory of estimated 1990 pesticidal VOC emissions based on 1991 pesticide use data, adjusted to represent the 1990 base year.” p. 6;
- “The baseline inventory will be calculated by summing the estimated 1990 emissions of each agricultural and commercial structural use pesticide.” p. 6;
- “[Estimated 1990 e]missions will be calculated by multiplying the VOC Emissions Factor value for each product by the adjusted use of that product in 1990.” p. 5.

The 1994 Pesticide SIP also emphasizes the use of the best available information to calculate the inventory, including in the rationale for using the 1991 PUR data in lieu of the 1990 data. It also allows (on page 6) for “further adjust[ments] by additional VOC Emission Factors if additional information becomes available.” While this statement applies to VOC emission factors, it would be counter-intuitive to limit adjustments to just this type of data if the primary interest is to produce the best possible assessment of pesticide VOC emissions in the 1990 base year.

In the 1994 Pesticide SIP (page 5), CDPR stated it would use the 1991 PUR data (backcasted to represent 1990) as the starting point for calculating the 1990 baseline inventory because “[i]t is believed that the 1991 pesticide use report would be a more accurate source to determine 1990 pesticidal VOC emissions.” CDPR did not concede that the 1991 PUR data was

more accurate and thus left open the option to use 1990 PUR data to calculate the 1990 baseline inventory if that data was determined to be more or similarly accurate. CDPR would later determine that the data for the two years was in fact of similar accuracy. This determination weakens any reading that the SIP mandates the use of the 1991 PUR data, given the SIP's emphasis on the 1990 baseline inventory reflecting 1990 conditions and on the use of the best available data.

We also observe that the use of unbackcasted 1991 PUR data to calculate the baseline inventory results in a 1991 baseline inventory. Using a 1991 baseline inventory to set SJV's (or any area's) pesticide VOC emission limit, as El Comité advocates, would conflict with the plain language of the 1994 Pesticide SIP, which indisputably requires that these emission limits be set from a 1990 baseline.

For these reasons, we conclude that the existing Pesticide Element *does* allow for the use of 1990 PUR data to determine 1990 baseline emissions, and thus, the establishment of an 18.1 tpd emission limit in the Valley that derives from 1990 PUR does not represent a revision to the SIP that results in higher emissions than would be allowed under the existing Pesticide Element.

For the purposes of this response, we have also investigated further the possibility that unbackcasted 1991 PUR data is required under the existing SIP and that use of 1990 PUR data would result in a higher limit than one resulting from the use of unbackcasted 1991 PUR data to establish the baseline emissions. To do this, we used information from the CDPR staff report on the revised SIP commitment for SJV to isolate the potential emissions impact of using 1990 PUR data rather than unbackcasted 1991 PUR data and calculated the difference to be 0.7 tpd.¹⁰ In

¹⁰ See CDPR staff report, p. 4. The 0.7 tpd is calculated as 88 percent of 20.6 tpd minus 88 percent of 19.8 tpd. The value of 20.6 tpd represents 1990 baseline emissions estimated using 1990 PUR data and 19.8 tpd represents 1991 baseline emissions estimated using 1991 PUR data.

other words, if unbackcasted 1991 PUR data were required to be used in connection with establishing baseline VOC emissions from agricultural and commercial structural applications, then, based on data in the CDPR staff report, the corresponding limit in SJV (ensuring a 12 percent reduction) would be 17.4 tpd, 0.7 tpd lower than the 18.1 tpd limit developed using 1990 PUR data.

Alternatively, based on this analysis, we find that, even if the existing SIP required the use of unbackcasted 1991 PUR data to calculate the baseline and the use of the 1990 PUR data represented a revision to the SIP, we find that the potential emissions impact (0.7 ton per day of VOC higher limit) of using 1990 PUR data instead would not interfere with RFP or attainment of the NAAQS, for the following reasons.¹¹ As to ozone, we note that the approved 1997 8-hour ozone plan for SJV shows how the plan provides for VOC and NO_x reductions that surpass RFP requirements and provides for expeditious attainment even without considering any VOC reductions from pesticides. See 76 FR 57846, 57861 and 57858 (September 16, 2011) and 77 FR 12652 (March 1, 2012). The SJV area has recently been designated as extreme nonattainment for the 2008 8-hour ozone NAAQS, but the nonattainment plan for that standard is not due until 2015. See 77 FR 30088 (May 21, 2012) and 40 CFR 51.908.

As to particulate matter (PM), we reiterate our observation from our proposed rule (at page 24447) that EPA has determined that VOC controls are not required for PM control in the SJV. See 72 FR 20586, 20589 (April 25, 2007); 69 FR 30006, 30007 (May 26, 2004); and 76 FR 69896, 69924 (November 9, 2011). In addition, we note that while the EPA-approved PM plans do not address the 2006 PM_{2.5} NAAQS for which the SJV has also been designated as

¹¹ For purposes of comparison, VOC emissions in SJV are expected to decline to 339 tpd by 2023 under the EPA-approved 2007 Ozone Plan. See 76 FR 57846, 57850 (September 16, 2011).

“nonattainment,” 74 FR 58688 (November 13, 2009), the nonattainment plan for the 2006 PM_{2.5} NAAQS is not due until December 2012.

Comment: El Comité asserts that because the 1994 Pesticide Element calls for year-round reductions, approval of the revisions would violate CAA section 110(l) because neither CDPR nor CARB has demonstrated that the SIP revision does not backslide when the SIP revision only calls for seasonal (May through October) controls.

Response: CAA section 110(l) does not prohibit any backsliding and does not bar approval of a SIP revision based solely on a state’s failure to accompany the revision with a demonstration of non-interference. Section 110(l) only prohibits backsliding that would interfere with any applicable requirement of the CAA.

El Comité provides no support for their position that the 1994 Pesticide Element requires year-round reductions. They do not cite to specific language in the Element and make no arguments as to why it should be interpreted to require year-around reductions. In our review of the 1994 Pesticide Element, we find nothing in it that directly addresses the issue of year around versus seasonal controls. Even with the most generous reading, the 1994 Element is at best ambiguous on the subject. This issue is also not directly addressed in EPA’s rulemakings on the 1994 Ozone Plan. For these reasons, we have looked to California’s stated purpose for including the 1994 Pesticide Element in its SIP and how the State relied on the emissions reductions from the Element to discern the best interpretation of its requirements regarding seasonality.

California submitted the 1994 Pesticide Element as part of its comprehensive plan to meet the 1-hour ozone standard and included reductions from this measure in the attainment demonstrations for the South Coast, Southeast Desert, Ventura County, SJV, and Sacramento nonattainment areas. From the language of the 1994 Pesticide Element itself, the reason for

including a measure to reduce pesticide VOC emissions in the SIP was to address pesticide's contribution to ozone formation. See 1994 Pesticide SIP, p. 1.

Ozone is a seasonal pollutant with unhealthy levels being recorded mainly in the summer months when conditions are most conducive to its formation. The seasonality of ozone standard exceedances is reflected in EPA's policies and regulations that require ozone SIPs to include summer season inventories. See, for example, EPA's General Preamble at 57 FR 13498, 13502.

We described California's definition of its "summer season" (that is, its ozone season) in our proposed approval of the 1994 Ozone SIP as being from May through October. See 61 FR 10920, 10937. Consistent with the summer season being the period of concern for ozone, all the emissions inventories, the rate of progress demonstrations, and the attainment demonstrations in the 1994 Ozone SIP are expressed in tons per summer day. See, for example, 61 FR 10920, 10943-44. Estimates of emissions reductions from measures are also expressed in tons per summer day.

Taken together, these facts argue that the 1994 Pesticide Element as approved can be reasonably interpreted to apply only to the ozone season. As we noted above, this ozone season was defined by California in its 1994 Ozone SIP as being from May to October, the exact period that the fumigant regulations and the revised pesticide commitment for SJV cover. We, therefore, find that approval of these SIP revisions does not violate CAA section 110(l) on the basis that they provide for seasonal controls only.

D. Enforceability of the Fumigant Regulations

Comment: El Comité alleges that the fumigant regulations are not enforceable because they do not guarantee that citizens and EPA have access to data to evaluate pesticide users' compliance

with the fumigant application methods or permits issued by County Agricultural Commissioners (CAC).

Response: Under the fumigant regulations, applicators (farm operators or pest control businesses) are required to limit their use of fumigant-specific application methods during May 1- October 31 to those methods specified in the regulations. An applicator demonstrates compliance with the regulations by reporting the details of each fumigant application (e.g. the permittee/property operator, operator ID/permit number, acres planted, acres treated, application method, crop, date, time, and location) to the CAC, which in turn, provides the data to CDPR. As El Comité acknowledges, the public can obtain PUR data by making a California Public Records Act (CPRA) request to the CAC or CDPR. In addition, CDPR makes the PUR data available electronically to the public for free at the California Pesticide Information Portal (CalPIP) website at <http://calpip.cdpr.ca.gov/main.cfm>. The fact that the public has free online access to individual and summary PUR data enhances enforceability as compared to other SIP regulations, for which the data may be only accessible through a CPRA request.

We note again that citizens are not limited to enforcing based solely on records reported by sources. Under applicable CAA and regulatory provisions, any credible evidence of violation may be used. Such credible evidence might include, for example, photographs of a fumigant application taken from a public road.

Comment: El Comité states that the two-year record retention time in 3 CCR section 6624(g) severely undermines enforceability of the fumigant regulations because PUR data may no longer be available by the time CDPR publishes its Annual Emissions Inventory Report, up to two years later.

Response: The PUR data used to determine compliance with the fumigant regulations and to support enforcement is available to regulators and the public well before the two-year user retention provision ends. The fumigant regulations require the property operator to submit a PUR to the CAC by the 10th of the month following each fumigant application. Pest control businesses must submit the PUR to the CAC within 7 days of the application. See 3 CCR section 6626 (a) and (b). The public can request PUR data from the CAC as soon as the PUR is submitted. The CAC must submit to CDPR a copy of each PUR received, and any other relevant information required by CDPR, within one calendar month after the CAC receives it. See California Food and Agricultural Code (CFAC) section 14012(b). CDPR publishes the PUR data online approximately one year after the growing season ends.¹² The PUR data, which is an input to the Annual Emissions Inventory Report, is not destroyed after two years, but rather it is retained and available on an on-going basis in CDPR's publicly-available, free and online PUR database at <http://calpip.cdpr.ca.gov/main.cfm>.

Comment: El Comité states that there are no monitoring provisions that would allow for an evaluation of whether the pesticide user met the emissions reductions specified for each fumigant application method or whether the user complied with a fumigant VOC emission limit.

Response: No such monitoring provisions are needed because the fumigant regulations do not require that an individual pesticide user meet either specific emissions reductions or the fumigant emission limit. Rather, they prohibit the use of certain fumigant application methods during the peak ozone season. In this way the fumigant regulations are similar to other regulations that require (or prohibit) use of certain control measures or work/management practices but do not

¹² Memorandum, Nancy Levin, EPA Region 9, to Docket EPA-R09-OAR-2012-0194, August 10, 2012, Subject: Summary of July 16, 2012 conference call between EPA and California Department of Pesticide Regulation.

otherwise require the source to meet specific numerical emission limits.¹³ EPA has approved many regulations that require the use of specific control methods, rather than a specific emission limit. For example, SIP regulations require gasoline stations to install pre-approved vapor recovery devices but do not concurrently require them to meet an emission limit.¹⁴ SIP rules for confined animal feeding operations, open burning, and agricultural fugitive dust are examples of regulations that require the use of specific management practices rather than compliance with a specific emission limit, similar to CDPR's pesticide regulations.¹⁵

Under the SIP, *fumigant* VOC emission limits will apply only in Ventura County. 3 CCR section 6452.2. Ventura County's overall pesticide VOC emission limit is monitored through the annual emissions inventory that is calculated by CDPR and not by individual pesticide users. Section 6452.4(a)(2). If pesticide VOC emissions in a given year approached or exceeded the limit, then CDPR and Ventura County CAC are required to implement a fumigant limit/allowance system and to condition or deny restricted use permits to limit fumigant VOC emissions until overall pesticide VOC emissions, as reported in the annual emissions inventory, fall back below the limit for two consecutive years. *Id.*

Comment: El Comité states that the regulations are not federally enforceable because they fail to require sources to comply with new permit conditions should the fumigant VOC emission limit and allowance system be triggered under 3 CCR section 6452.2.

¹³ CAA section 302(k) defines the terms "emission limitation" and "emission standard" to include a design, equipment, work practice or operational standard.

¹⁴ See, for example, SJVUAPCD Rule 4622 Gasoline Transfer Into Motor Vehicle Fuel Tanks (amended December 20, 2007), approved 74 FR 56120 (October 30, 2009).

¹⁵ See, for example, SJVUAPCD Rule 4570 Confined Animal Facilities (amended October 21, 2010), approved 77 FR 2228 (January 17, 2012); Rule 4103 Open Burning (amended May 14, 2010), approved, 77 FR 214 (January 4, 2012); Rule 4550 Conservation Management Practices (amended August 19, 2004), approved 71 FR 7683 (February 14, 2006).

Response: The requirement to condition permits to comply with a fumigant VOC emission limit is only applicable to Ventura County under the SIP. Section 6452.2(e) prohibits a person from applying a field fumigant during the ozone period once the fumigant VOC emission limit is established unless their restricted material permit includes a field fumigant emission allowance or the notice of intent (NOI) to apply a fumigant is approved in writing. In addition, section 6452.2(c) requires that if Ventura County's fumigant VOC limit is triggered, the CAC must condition or deny permits in such a manner to assure that the fumigant VOC emission limit is not exceeded. These sections, which are being incorporated into the SIP, are sufficient for federal enforceability.

Comment: El Comité argues that 3 CCR section 6452(b) provides for improper director's discretion for alternative methods, noting, in particular, the lack of explicit and replicable procedures for determining whether the scientific data demonstrates that the alternative method's emissions rates are no greater than other methods allowed under the regulations.

Response: EPA has determined that the director discretion in section 6452(b) is not a basis for disapproval given the restrictions placed on the CDPR Director's ability to approve alternative methods and given the limited history of regulating fumigant application methods to reduce VOC emissions. See TSD, section II.E.

EPA's general policy regarding director's discretion is stated in 52 FR 45109 (November 24, 1987). Provisions allowing for a degree of state director discretion may be considered appropriate if explicit and replicable procedures within the rule tightly define how the discretion will be exercised to assure equivalent emissions reductions.¹⁶ Under section 6452(b), a request for approval of an alternative application method must be accompanied by scientific data

¹⁶ EPA Region 9, Guidance Document for Correcting Common VOC & Other Rule Deficiencies, (a.k.a., Little Bluebook), August 21, 2001.

documenting the VOC emissions reductions (section 6452(b)(1)) and no alternative method may be approved if its emission rate and the maximum emission rate are greater than those for any method already specified in the regulations for use in the area for that fumigant (section 6452(b)(1)(A) and (B)). Section 6452(c) also explicitly requires the CDPR Director to evaluate the submitted scientific data to determine whether: 1) the data and information provided are sufficient to estimate emissions; 2) the results are valid as indicated by the quality control data; and 3) the conditions studied represent agricultural fields fumigated. A notice of interim approval of an alternative method must be published on CDPR's web site (section 6452(d)) and interim approvals expire after three years (section 6452(e)). In addition, we note that all pesticide users are required by law to follow the federal label, state regulations, and permit conditions at the county level (CFAC section 12973). These provisions appropriately limit the CDPR director's discretion.¹⁷

E. Pesticide Emissions Inventories

Comment: El Comité comments the Method Usage Fractions (MUF) for the 1991 and 2004 inventories do not have a factual foundation in the PUR. They also comment that the validity of the MUF for the 1991 inventory for all fumigants but 1,3-dichloropropene are not verifiable and that CDPR has not presented any evidence supporting its estimates of historical fumigant application methods, nor has it made public the details of the process by which this information was obtained.

¹⁷ We note that EPA has approved a limited number of other SIP rules addressing similar regulatory programs allowing for director's discretion to approve alternate methods of compliance, provided that emissions are no greater than other approved methods. See, for example, SJVUAPCD Rule 4550 Conservation Management Practices (amended August 19, 2004), Section 6.2.3.2; approved 71 FR 7683 (February 14, 2006).

Response: The PUR reports were not required to list the fumigation application method prior to 2008; therefore, it is not possible to base the MUF of the PUR prior to that year.¹⁸ We note that the 1990, 1991 and 2004 inventories do not have any relevance to today's action.

CDPR has provided a detailed explanation of its process for determining the frequency of use of historical fumigant methods for the 1991 inventory as well as the 1990 inventory (which is the basis for calculating reductions) in the Barry memorandum.¹⁹ Prior to 2008, the MUF were based on grower/applicator surveys, use data, expert opinion, and regulatory history. Since 2008, applicators have been required to report application methods on the PUR, so recent MUF calculations are based on empirical data. EPA has been presented with no evidence to dispute that CDPR used best available data to develop the MUF for the baseline inventory.

Comment: El Comité comments that CDPR's Application Method Adjustment Factors (AMAF) are based on unrepresentative field fumigation studies conducted in other states under cool soil conditions and therefore do not provide an accurate estimate of emissions from California fumigations conducted at high temperatures in the Central Valley during the peak ozone season from May to October. They also comment that studies conducted under worst-case scenarios have been excluded from the group of studies on which the fumigant application regulations are based.

¹⁸ Usually there are several different types of application methods used for a particular fumigant in any particular NAA. Each method of use (e.g. drip, sprinkler, shank, tarp, etc.) represents a fraction of the total number of methods used and is referred to as the Method Use Fraction (MUF). The sum of all MUFs for any particular (NAA/fumigant AI) combination is one. See Rosemary Neal, Ph.D., Frank Spurlock, Ph. D., and Randy Segawa, California Department of Pesticide Regulation, "Annual Report on Volatile Organic Compound Emissions from Pesticides: Emissions For 1990 – 2010," Revised, June, 2012 ("Revised 2010 Pesticide VOC Emissions Report"), p. 13.

¹⁹ Memorandum, Terrell Barry, Ph.D., *et al.*, CDPR, to John Sanders, Ph.D., CDPR; "Pesticide Volatile Organic Compound Emission Adjustments for Field Conditions and Estimated Volatile Organic Compound Reductions-Revised Estimates;" September 29, 2007.

Response: Similar comments were raised to CDPR during the comment periods prior to the adoption of the 2008 fumigant regulations and to CARB during the comment period prior to the adoption of the 2007 State Strategy (specifically on the revisions to the 1994 Pesticide Element for Ventura County that were included as Appendix H to the State Strategy). CDPR responded to these comments in the final Barry Memorandum (pp. 15-17) and in its response to comments on its proposed regulations.²⁰ CARB also provided responses.²¹ Both stated that the studies included had been reviewed and accepted as sufficient to provide reliable data and were conducted under a variety of conditions and locations.

Comment: El Comité comments that 1) the field studies of AMAF have highly variable results even among similar studies and are therefore highly uncertain and that previous reviews have noted uncertainties in AMAF estimates and concluded that some AMAF proposed by CDPR were not conservative enough. They also comment that because the natural variability in flux rates (the rate at which the fumigant escapes from the soil) is large, a single study (or even several studies) will not provide an accurate estimate of actual emissions.

Response: CDPR responded to similar comments made during the 45-day comment period on the initial proposal of the fumigant regulations in July 2007. It agreed that flux rates vary and that the Department has chosen to average flux rates to get the most accurate picture of overall emissions. Their response, which is supported by CARB, is as follows:

DPR agrees that the variability in flux rates (emissions) between applications is

large. For fumigants and application methods with multiple studies, the standard

²⁰ See CDPR, Rulemaking File For Regulations Filed and in Effect on January 8, 2008; Final Statement of Reasons, Attachment A: Summary of Comments Received During the 45-Day Comment Period and DPR's Response.

²¹ CARB, Environmental Analysis for the Proposed Revision to the Pesticide Commitment of the 1994 Ozone SIP for the Ventura County Nonattainment Area, Revised August 13, 2007 ("CARB August 2007 Environmental Analysis").

deviations of the emissions are approximately 50 percent. DPR has chosen to use the average flux rates to estimate emissions for three reasons. First, the emissions inventory represents the aggregate emissions from all agricultural and structural pesticide applications within a region over several months. The average flux rates represent the most accurate estimate of aggregate emissions. Second, all pesticide applications included in DPR's inventory represent its most accurate and consistent estimate of emissions, for both the base year and subsequent years. Using a consistent method to estimate emissions is essential for making relative comparisons and determining compliance with the SIP commitments. Using the most accurate estimates for some applications and high-end estimates for other applications would skew the inventory and make relative comparisons unreliable. Third, even if DPR were to use high-end emission estimates, they would affect both current emissions and emissions for the 1991 base year. Estimates of the 1991 base year emissions are generally more uncertain, than current emissions. DPR would likely apply a larger uncertainty factor to the 1991 base year than current emissions, and the emissions reductions achieved would be larger than currently estimated using the average flux rates.

See CDPR, Rulemaking File For Regulations Filed and in Effect on January 8, 2008; Final Statement of Reasons, Attachment A: Summary of Comments Received During the 45-Day Comment Period and DPR's Response.

Therefore, we conclude that CDPR took a reasoned approach to establishing AMAF based on the available science.

F. Necessary Assurances under CAA Section 110(a)(2)(e)

Comment: El Comité states that the fumigant regulations are unenforceable because they do not provide a funding mechanism, and because CDPR has not demonstrated under CAA section 110(a)(2)(E) that the state and CAC have adequate personnel, funding and authority to implement and enforce the regulations.

Response: We disagree that the fumigant regulations are unenforceable if they do not provide a mechanism to fund enforcement. Nothing in the CAA or EPA regulations require a SIP rule to include a rule-specific funding mechanism in order to be enforceable. If that were so, every SIP-approved rule would need to contain a specific funding mechanism before EPA could incorporate into SIP, which is not the case.

CAA section 110(a)(2)(e) requires states to provide “necessary assurances that the State...will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan.” CDPR has provided sufficient assurance that it has adequate funding (as well as personnel and authority) to implement the regulations.

CDPR funds CAC on an annual basis to conduct inspections and enforcement activities. Funding derives from an assessment on pesticide sales. CDPR collects 21 mill (or 2.1 cents) per dollar, of which approximately 7.6 mill is designated for CAC pesticide use inspection and enforcement activities (3 CCR section 6386; CFAC sections 12841 and 12841.3). In 2006 CDPR and the California Agricultural Commission and Sealers Association entered into a Memorandum of Understanding that explains the process for distributing funds.²²

²² CDFA, Disbursement of Residual Mill Assessment Funds To Enhance Local Pesticide Enforcement Programs, May 2006, found at http://www.cdca.ca.gov/exec/county/documents/DISBURSMENT_OF_RESIDUAL_MILL_ASSSSMENT_FUNDS_TO_ENHANCE.pdf.

The CAC have conducted 3,154 field fumigant inspections since January 1, 2008.²³ In 2010-2011, CAC made 724 field fumigant inspections and 2,130 structural fumigation inspections statewide.²⁴ In addition, CAC must conduct pre-application site evaluation inspections for at least 5 percent of all sites identified in permits or notices of intent (NOI) to apply pesticides for agricultural use (3 CCR section 6436). In 2010-2011, CAC's conducted a total of 7,941 pre-application inspections out of a total of 136,491 NOI,²⁵ or 5.8 percent of NOI reviewed.

Both CDPR and CAC enforcement authority is derived from State law and regulation. See CFAC section 14004; see also, CFAC section 2281 and 11501.5 and 3 CCR sections 6140 and 6128. Beyond its enforcement authorities, California law provides CDPR with the authority to place limitations on the quantity, area, and manner of application to reduce pesticide emissions through restricted materials permit conditions. See CFAC section 14006.5 and 3 CCR section 6412. Permits to use restricted materials are issued by the CAC, who has broad discretion to condition the permits on additional use restrictions. See CFAC section 14006. CDPR has oversight of the permit process and recommends conditions to be included in the CAC's permits. It can also enact use restrictions by regulation. See CFAC section 14005. In addition, for products containing a new active ingredient, CDPR may place appropriate restrictions on a product's use, including limitations on the quantity, area, and manner of application, and require low VOC formulations as a condition of registration. See CFAC section 12824.²⁶

²³ Email and attachment from Ken Everett, CDPR to Nancy Levin, EPA, August 1, 2008.

²⁴ See CDPR, California Statewide Pesticide Regulatory Activities Summary Between July 2010 and June 2011 (<http://www.cdpr.ca.gov/docs/enforce/prasr/10-11prasr.pdf>), page 31.

²⁵ See CDPR, California Statewide Pesticide Regulatory Activities Summary Between July 2010 and June 2011, pp. 31 and 33 (found at <http://www.cdpr.ca.gov/docs/enforce/prasr/10-11prasr.pdf>).

²⁶ CDPR describes its authorities on page 1 of the revised SIP commitment for the SJV.

Comment: El Comité asserts that approval of the revised SIP commitment for the SJV and the fumigant regulations would be arbitrary and capricious and a violation of CAA section 110(a)(2)(E) because neither CDPR nor CARB have provided a demonstration that the commitment and regulations are not prohibited by Title VI of the Civil Rights Act and EPA's regulations implementing Title VI.

Response: In addition to requiring a state to provide necessary assurances regarding adequate resources and authority for implementation, CAA section 110 (a)(2)(E) also requires a state to provide "necessary assurances that the State . . . is not prohibited by any provision of Federal or State law from carrying out such [SIP]."

El Comité asserts that California failed to provide a "demonstration" that its proposed revisions are not prohibited by Title VI of the Civil Rights Act.²⁷ Section 110(a)(2)(E), however, does not require a state to "demonstrate" it is not prohibited by Federal or State law from implementing its proposed SIP revision. Rather, this section requires a state to provide "necessary assurances" of this. Courts have given EPA ample discretion in deciding what assurances are "necessary" and have held that a general assurance or certification is sufficient. ("EPA is entitled to rely on a state's certification unless it is clear that the SIP violates state law and proof thereof...is presented to EPA." *BCCA Appeal Group v. EPA*, 355 F.3d 817, 830 fn 11 (5th Cir. 2003)).

²⁷ Title VI of the Civil Rights Act of 1964 prohibits discrimination by entities receiving federal funds. 42 U.S.C. 2000d. Section 601 provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. *Id.* Section 602 authorizes federal agencies that provide federal funding assistance to issue regulations to effectuate the anti-discrimination provisions of Title VI. *Id.* at 2000d-1. Pursuant to section 602, EPA promulgated regulations prohibiting EPA funding recipients from engaging in discrimination. See 40 CFR 7.30 and 7.35.

El Comité does not allege a violation of Title VI by either CDPR or CARB nor does it provide evidence that either the revised SIP commitment for the SJV and/or the fumigant regulations would result in any adverse environmental impacts. While El Comité includes in their letter several statements on fumigant usage and fumigant VOC emissions in Ventura County and the SJV (citing various CDPR documents as the sources), it provides no evidence that these usage rates or pesticide VOC emissions rates are either the result of implementing the revised SIP commitment and/or fumigant regulations or would not have resulted absent the implementation of the commitment and regulations.²⁸

On the other hand, California has provided multiple evaluations that show the revised SIP commitment for SJV and the fumigant regulations will improve California's air quality by reducing VOC emissions from pesticides, will not result in any significant adverse environmental impacts, and in fact, by reducing VOC, will improve air quality and assist the areas in their progress toward attainment of the ozone standards.²⁹

Both CDPR and CARB receive annual grants from EPA and have done so for many years. As grant recipients, both agencies must certify their compliance with Title VI and have done so in every year since the revised commitment and fumigant regulations were first adopted by CDPR in 2007 and submitted by CARB in 2009.³⁰ In addition, by letter dated August 7, 2012, CDPR provided EPA a further description of the ways in which its pesticide regulatory program,

²⁸ It is also worthy of note that, to EPA's knowledge, none of the groups that signed the El Comité letter raised Title VI concerns during CDPR's rulemaking process to adopt and amend the fumigant regulations or adopt the revised SIP commitment for SJV nor did they raise any Title VI concerns to EPA while CDPR and CARB were going through their respective rulemaking processes.

²⁹ For a list of these, see TSD, Section III.F. Response F-2.

³⁰ See, for example, EPA Form 4700-4, Preaward Compliance Review Report for All Applicants and Recipients Requesting EPA Financial Assistance for CDPR, May 10, 2010 and EPA Form 4700-4, Preaward Compliance Review Report for All Applicants and Recipients Requesting EPA Financial Assistance for CARB, August 13, 2010.

including the VOC rule EPA is approving today, complies with sections 601 and 602 of Title VI of the Civil Rights Act of 1964 (Title VI) that govern recipients of federal financial assistance.³¹

Thus, EPA concludes California has provided the necessary assurances pursuant to 110(a)(2)(e).

G. EPA's Response to the Ninth Circuit Court of Appeals Remand in *Association of Irrigated Residents Case*

Comment: El Comité asserts that EPA offered no factual basis or reasoned explanation for concluding that, with the addition of the fumigant regulations, the revised SIP commitment for SJV is sufficiently enforceable, and because EPA has failed to provide an explanation, its approval of the fumigant regulations and the revised SIP commitment as enforceable in tandem is arbitrary and capricious.

Response: On page 24450 of our April 24, 2012 proposed rule, we concluded that:

... there is no need to rescind or otherwise modify our 1997 approval of the Pesticide Element or our 2009 approval of PEST-1 notwithstanding the deficiencies in enforceability in the Pesticide Element due to the absence of an enforceable mechanism like the Wells Memorandum. In short, this is because CDPR's regulations and revised commitment for San Joaquin Valley provide the enforceable mechanism that would otherwise be lacking in the Pesticide Element. If EPA approves the regulations and commitment, as proposed herein, then the Pesticide Element would be fulfilled. If, after consideration of comments, EPA concludes that the regulations and commitment do not meet the applicable CAA requirements, then the decision regarding EPA's previous actions on the Pesticide Element would need to be reconsidered.

³¹ Letter, Brian R. Leahy, Director, CDPR to Jared Blumenfeld, Regional Administrator, EPA Region 9, August 7, 2012, which can be found in the docket for this rule.

As explained further here and in other sections of this document, EPA is concluding CDPR's regulations and the commitment meet the applicable CAA requirements, and thus, we are finalizing our determination that the commitments in the 1994 Pesticide Element have been fulfilled, which in turn, forms the basis for our final decision not to rescind or otherwise modify our 1997 approval of the Pesticide Element or our 2009 approval of PEST-1. Specifically, as to SJV, we stated:

For San Joaquin Valley, CDPR's regulations restricting fumigant application methods and establishing requirements on CDPR to inventory and report VOC emissions from pesticide use apply just as they do in the other four nonattainment areas. While these regulations and other measures have decreased VOC emissions from pesticide use in San Joaquin Valley such that current VOC emissions are approximately 18 percent less than 1990 levels, CDPR concluded that a mechanism was needed to supplement the regulations to ensure that the 12 percent emissions reduction target would be met in the San Joaquin Valley. The supplemental mechanism chosen by CDPR is the adoption of a commitment, which we are proposing to approve in today's action, to manage VOC emissions from commercial structural and agricultural pesticide use, such that the related VOC emissions do not exceed 18.1 tons per day in the San Joaquin Valley. This level of emissions reflects a 12 percent emissions reduction from 1990 level of VOC emissions from pesticide use. The specific measures that CDPR would undertake to bring emissions back down to that level in the event that the annual inventory reveals that the 18.1 tons per day emissions level had been exceeded are vague. Considered in isolation, the revised commitment for San Joaquin Valley

changes the form of the commitment in the Pesticide Element for the valley but does not represent an enforceable measure for SIP purposes. However, when viewed in light of the CDPR's regulations, the combination of the commitment and fumigant regulations does meet the minimum requirements for enforceability of SIP measures and reasonably ensures that the 12 percent emissions reduction target from the Pesticide Element would be achieved in San Joaquin Valley.

77 FR 24441, 24450.

Factual support for our conclusion is found in the CDPR staff report on the revised SIP commitment for SJV which provides a table of baseline pesticide emissions in SJV (19.3 tpd) and an estimate of the VOC emissions reductions (1.5 tpd) due to CDPR's fumigant regulations (that are being approved as part of this action). Based on the data in CDPR's table, the fumigant regulations reduce baseline pesticide emissions to 17.8 tpd, which is 0.3 tpd less than the 18.1 tpd emissions cap (that derives from the 12 percent emissions reduction commitment from the existing California SIP Pesticide Element). Therefore, in most years, CDPR's fumigant regulations alone would safeguard the emission limit.

CDPR acknowledges, however, that fumigant use varies from year to year and could in some years be unusually high, raising the potential for the emission limit to be exceeded. This is why CDPR commits (1) to implement restrictions to reduce VOC emissions from non-fumigant pesticides by 2014 and (2) to commit to manage pesticide VOC emissions in SJV through annual emissions inventories and take further steps to reduce pesticide VOC emissions if necessary to bring such emissions back down below the emission limit.

Comment: El Comité argues that EPA's rationale for finding the combination of the revised SIP commitment for SJV and the fumigant regulations enforceable is unfounded because three

quarters of all adjusted pesticide VOC emissions in the SJV in 2010 came from non-fumigants and SJV exceeded the 18.1 tpd emissions cap in 2005 and 2006 “despite CDPR’s use of an adjusted inventory for fumigants in the Valley.” They argue further that controlling only one-quarter of the pesticide VOC inventory in the Valley with the fumigant regulations does not ensure that the revised SIP commitment meets the CAA requirement for enforceability.

Response: El Comité cites CDPR's 2010 annual inventory of pesticide VOC emissions as the source for their claim that VOC emissions in SJV exceeded the 18.1 tpd limit in 2005 and 2006 and that fumigant VOC emissions represent only 25 percent of the overall total pesticide emissions in SJV. Based on our review of CDPR's Revised 2010 Pesticide VOC Emissions Report, we confirm El Comité's factual statements but believe that the report supports EPA's conclusion that the combination of the commitment and fumigant regulations does meet the minimum requirements for enforceability of SIP measures and reasonably ensures that the 12 percent emissions reduction target from the Pesticide Element would be achieved in SJV. This is because (1) the emissions cap of 18.1 tpd has not been exceeded since adoption of CDPR's fumigant regulations in 2008; and (2) the percentage of pesticide VOC emissions due to fumigant use has declined from an average of 34 percent during the 3-year period (2005-2007) prior to implementation of CDPR's fumigant regulations to an average of 24 percent during the 3-year period (2008-2010) after implementation. See tables 5 and 6a of CDPR's Revised 2010 Pesticide VOC Emissions Report. This decline in the percentage of pesticide VOC emissions due to fumigant use is exactly the effect that would be expected in light of the implementation of CDPR's restrictions on the use of higher-emitting application methods, and it demonstrates that CDPR's fumigant regulations are effective at reducing pesticide VOC emissions in the SJV and to maintaining in compliance with the 18.1 tpd emission limit.

Comment: El Comité argues that because the SIP revision lacks a commitment to retain the fumigant regulations, EPA's rationale for using the fumigant regulations as its basis for finding the SIP revision enforceable is "illusory." El Comité asserts that CDPR could rescind the fumigant regulations and CARB could offer new VOC controls applicable to other sources to support a section 110(l) demonstration.

Response: The SIP revision does not need to include a commitment to retain the fumigant regulations. If CDPR were to rescind the fumigant regulations, such rescission must be approved by EPA as a SIP revision to be rescinded as a part of the California SIP. The CAA does not allow unilateral changes to SIPs by states. Moreover, EPA has determined that the fumigant regulations are required to meet the section 182(b)(2) reasonably available control technology (RACT) requirement in the SJV, so for at least for SJV, California would need to demonstrate that the SIP still provides for RACT in SJV absent the fumigant regulations. Simple substitution of the fumigant regulations with new VOC emissions controls may not suffice in SJV due to the RACT requirement for the pesticide use source category.

In addition, to approve any rescission of CDPR's fumigant regulations submitted as a SIP revision, we would need to find that such rescission would not interfere with RFP and attainment of the NAAQS or any other applicable requirement of the Act pursuant to CAA section 110(l), and would therefore need to consider the effect of the rescission on the continued enforceability of the California SIP Pesticide Element and would need to consider the emissions impacts in the context of the RFP and attainment needs of the areas for which the regulations provide emissions reductions. Lastly, we note that any action EPA would take on such a rescission of the fumigant regulations would be subject to the normal public notice and comment procedures that EPA follows for all actions on SIPs and SIP revisions.

III. Final Action

EPA is approving under CAA section 110(k)(3) the revisions to the California SIP Pesticide Element submitted by CARB on October 12, 2009 and August 2, 2011 (with the exception of the provisions related to methyl iodide). These revisions include CDPR's fumigant regulations and its revised SIP commitment for the SJV. Our approval will incorporate these revisions into the California's federally-enforceable SIP. This approval also satisfies California's obligation to implement RACT for field fumigation operations in the SJV under CAA section 182(b)(2) for the 1-hour ozone and 1997 8-hour ozone standards and thereby terminates both the sanctions clocks and the Federal Implementation Plan clock for this source category triggered by our January 10, 2012 partial disapproval action. See 77 FR 1417 (January 10, 2012).

EPA provided its preliminary response to the remands by the Ninth Circuit Court of Appeals in *Association of Irrigated Residents v. EPA*, 632 F.3d 584 (9th Cir. 2011), revised January 27, 2012 (*AIR*) in the proposal for this rule. See 77 FR 24441, 24447. The *Association of Irrigated Residents* remand required EPA to evaluate the California SIP Pesticide Element for enforceability under the CAA. In the proposed rule, EPA found that there is no need to either rescind or modify our prior approvals of the Pesticide Element because it had concluded that the SIP revisions fulfilled the commitments of the original Pesticide Element, thus obviating the need to address the deficiencies in enforceability of those original commitments. We are finalizing our response from the proposal without change.³²

IV. Statutory and Executive Order Reviews

³² Our final response to the remand in *Association of Irrigated Residents* also represents our final response to the Ninth Circuit's July 2, 2012 remand order in *El Comité Para El Bienestar De Earlimart v. EPA* (No. 08-74340). Because both remands necessitate the same type of evaluation for the same portion of the California SIP, our rationale for our response to both remands is the same.

Under the Clean Air Act, the EPA Administrator is required to approve a SIP submittal that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submittals, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule

does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

AUTHORITY: 42 U.S.C. 7401 *et seq.*

Dated: August 14, 2012

Jared Blumenfeld,
Regional Administrator, Region 9

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52 – [AMENDED]

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart F – California

2. Section 52.220 is amended by adding paragraphs (c)(413) and (c)(414) to read as follows.

§52.220 Identification of plan.

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(c) * * *

(413) The following plan revisions were submitted on October 12, 2009, by the Governor's designee.

(i) Incorporation by reference.

(A) California Department of Pesticide Regulation.

(1) California Code of Regulations, Title 3 (Food and Agriculture), Division 6 (Pesticides and Pest Control Operations), Chapter 2 (Pesticides), Subchapter 4 (Restricted Materials), Article 4 (Field Fumigation Use Requirements), sections 6447, "Methyl Bromide-Field Fumigation - General Requirements," the undesignated introductory text (operative January 25, 2008; as published in Register 2010, No. 44); 6447.3, "Methyl Bromide Field Fumigation Methods" (operative January 25, 2008); 6448, "1,3, Dichloropropene Field Fumigation – General Requirements" (operative January 25, 2008); 6449, "Chloropicrin Field Fumigation – General Requirements" (operative January 25, 2008); 6450, "Metam-Sodium, Potassium N-methyldithiocarbamate (metam-potassium), and Dazomet Field Fumigation –

General Requirements” (operative January 25, 2008); 6450.2, “Dazomet Field Fumigation Methods” (operative January 25, 2008); 6451, “Sodium Tetrathiocarbonate Field Fumigation – General Requirements” (operative January 25, 2008); 6451.1, “Sodium Tetrathiocarbonate Field Fumigation Methods” (operative January 25, 2008); 6452, “Reduced Volatile Organic Compound Emissions Field Fumigation Methods” (operative January 25, 2008); 6452.1, “Fumigant Volatile Organic Compound Emission Records and Reporting” (operative January 25, 2008).

(ii) Additional material.

(A) California Department of Pesticide Regulation.

(1) Decision, "In the Matter of Proposed Ozone SIP Commitment for the San Joaquin Valley," signed by Mary-Ann Warmerdam, April 17, 2009, including Exhibit A, "Department of Pesticide Regulation Proposed SIP Commitment for San Joaquin Valley."

(2) Memorandum, Rosemary Neal, Ph.D., California Department of Pesticide Regulation to Randy Segawa, California Department of Pesticide Regulation, November 5, 2008; Subject: Update to the Pesticide Volatile Organic Inventory. Estimated Emissions 1990-2006, and Preliminary Estimates for 2007.

(414) The following plan revisions were submitted on August 2, 2011, by the Governor’s designee.

(i) Incorporation by reference.

(A) California Department of Pesticide Regulation.

(1) California Code of Regulations, Title 3 (Food and Agriculture), Division 6 (Pesticides and Pest Control Operations), Chapter 2 (Pesticides), Subchapter 4 (Restricted Materials), Article 4 (Field Fumigation Use Requirements), sections 6448.1, “1,3-

Dichloropropene Field Fumigation Methods” (operative April 7, 2011); 6449.1, “Chloropicrin Field Fumigation Methods” (operative April 7, 2011); 6450.1, “Metam-Sodium and Potassium N-methyldithiocarbamate (Metam-Potassium) Field Fumigation Methods” (operative April 7, 2011); 6452.2, “Fumigant Volatile Organic Compound Emission Limits” (excluding benchmarks for, and references to, Sacramento Metro, San Joaquin Valley, South Coast, and Southeast Desert in subsection (a) and excluding subsection (d))(operative April 7, 2011); 6452.3, “Field Fumigant Volatile Organic Compound Emission Allowances” (operative April 7, 2011); 6452.4, “Annual Volatile Organic Compound Emissions Inventory Report” (excluding reference to section 6446.1 in subsection(a)(4))(operative April 7, 2011).

(2) California Code of Regulations, Title 3 (Food and Agriculture), Division 6 (Pesticides and Pest Control Operations), Chapter 3 (Pest Control Operations), Subchapter 2 (Work Requirements), Article 1 (Pest Control Operations Generally), sections 6624, “Pesticide Use Records” (excluding references in subsection (f) to methyl iodide and section 6446.1) (operative December 20, 2010); section 6626, “Pesticide Use Reports for Production Agriculture” (operative April 7, 2011).

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